No. 84-30

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES COPELIN,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

ON PETITION FOR WRIT
OF CERTIORARI TO THE
COURT OF APPEALS OF ALASKA

PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Argument

I. THE DEFENDANT PROPERLY PRESERVED THE FOURTEENTH AMENDMENT ISSUE.

The State first argues that Mr. Copelin did not properly preserve the Fourteenth Amendment/Fundamental Fairness issue in the courts below. The State is mistaken.

A. The Issue Was Raised Before the Alaska Court of Appeals.

In his opening brief to the Alaska Court of Appeals, Mr. Copelin specifically relied upon the Fourteenth Amendment's guarantee of fundamental fairness in support of his argument that he should have been allowed to call his attorney.

The first two paragraphs of "Section A" of Mr. Copelin's Court of Appeals brief read as follows:

A. The Defendant Had A Constitutional Right to Consult With Counsel Before the Administration of Field Sobriety Tests.

The defendant has repeatedly argued in this case that he had a constitutional right to at least attempt to communicate with counsel before being administered alcohol sobriety tests. Rather than repeat those arguments in detail here, the defendant incorporates by reference his Opening and Reply Briefs at 7-17; 1-15, respectively, filed with this court in Copelin I and relied upon by the Alaska Supreme Court in Copelin II.

In those briefs, the defendant relied upon a number of cases from other jurisdictions recognizing the constitutional right of an OMVI suspect to confer by telephone with counsel prior to the administration of alcohol sobriety tests, provided that contact can be made within a reasonable period of time. These cases follow either a traditional Sixth Amendment-type analysis or a Fourteenth Amendment/Fundamental Fairness Approach. (In addition to the defendant's earlier briefs, see generally, Annot., Denial of Accused's Request for Initial Contact With Attorney--Drunk Driving Cases, 18 A.L.R. 4th 705 (1982).) [emphasis added.]

The last paragraph of Section A of the brief also refers to the fundamental fairness argument:

> As extensively argued in prior briefs filed with this court, a limited right of an OMVI suspect to attempt to confer telephonically with counsel prior to the administration of alcohol sobriety tests will serve to protect the suspect's right to counsel and fundamental fairness, while not seriously impeding the State's ability to gather inculpatory evidence. [emphasis added.]

Mr. Copelin's Reply Brief also discussed the fundamental fairness issue. Note the following excerpt from pps. 5-6 of the Brief:

> II. CONSTITUTIONAL RIGHT TO TELEPHONE COUNSEL.
>
> A. "On the Scene Questioning" Exception to the Miranda Rule.
>
> * * *
>
> First, contrary to the State's assertions, the right to counsel guaranteed under Miranda v. Arizona, 384 U.S. 436 (1965), concerns a suspect's right to counsel under the Fifth, not Sixth

> Amendment. See discussion in Edwards v. Arizona, 451 U.S. 477 (1981). Accordingly, the fact that the subject of a routine traffic stop may not be entitled to counsel under Miranda has no bearing on the Sixth and Fourteenth Amendment right to counsel claims being raised here. [emphasis added.]

Further, in Mr. Copelin's opening brief (excerpted supra at 2-3), he incorporated by reference the constitutional arguments raised in his opening and reply briefs filed in an earlier appeal in the same case. The court formally took judicial notice of these earlier briefs in an order dated October 20, 1983. (See Appendix A.)

One of these earlier briefs was Mr. Copelin's November 10, 1980 opening brief filed in his first appeal. The constitutional right to counsel issue was discussed at pps. 7-17. Pertinent to the Fourteenth Amendment/Fundamental Fairness argument, is the following excerpt from pps. 15-17:

In Hall v. Secretary of State, 231 N.W.2d 396 (Mich. App. 1975), a license revocation proceeding involving Michigan's implied consent statute, the Court of Appeals of Michigan reversed a motorist's license revocation after learning that the defendant had been denied his request to consult with counsel when that request was made before deciding whether to take or to refuse the breathalyzer analysis. The court noted that the ability to consult with one's attorney before deciding whether to take or refuse a breathalyzer analysis was a fundamental right, protected under the Fourteenth Amendment to the United States Constitution. Similar results were reached by a number of lower courts in Ohio during the early 1970's. [cit.om.]

In People v. Gursey, 239 N.E.2d 351 (N.Y. 1968); North Carolina v. Hill, 178 S.E.2d 462 (N.C. 1971); and State v. Welch, 376 A.2d 351 (Vt. 1977), the Supreme Courts of New York, North Carolina and Vermont, respectively, recognized the constitutional right of a criminal defendant in an OMVI proceeding to confer with counsel before deciding whether to take or refuse a breathalyzer analysis. (Cf. Seders v. Powell, 250 S.E.2d 690 (N.C. 1979).)

> Such a limited right to call and briefly confer with counsel after one's arrest for driving while under the influence, before complying with intoxication tests, will protect both a motorist's right to counsel as well as his due process right to fundamental fairness, and will not unduly delay the ultimate taking of the tests. [cit.om.; emphasis added.]

The March 10, 1981 reply brief filed by Mr. Copelin in the first appeal was also judicially noticed by the Court of Appeals. (Appendix A.) Pages 11-15 of that brief specifically discussed the Fourteenth Amendment/Fundamental Fairness issue. The following excerpt should serve as verification:

> B. Right to Fundamental Fairness.
>
> Even if this court refuses to recognize an Art. I, Section 11/Sixth Amendment Right to Counsel under a traditional "right to counsel" analysis, the defendant urges the court to recognize that a right to attorney access exists after a

> suspect requests counsel, under a Fourteenth Amendment/"Fundamental Fairness" approach.
>
> * * *
>
> Throughout both the trial and appellate level, the defendant has consistently argued that once a suspect requests an attorney, he should be permitted to contact an attorney to assist him in his defense as a matter of fundamental fairness. Such an argument is based upon a Fourteenth Amendment/Art. I, Section 7 analysis, and not a Sixth Amendment/Art. I, §11 analysis. [emphasis added.]

The State's assertion that the fundamental fairness issue was not raised before the Court of Appeals is simply wrong.

B. The Fourteenth Amendment Issue Was Raised Before the Alaska Supreme Court.

The State also argues that Mr. Copelin's federal constitutional claims were not raised before the Alaska Supreme Court in his Petition for Hearing. The State is again mistaken. The second

issue raised in Mr. Copelin's Petition reads:

> 2.) Did the trooper's actions deny the motorist's constitutional right to contact counsel, guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 7 and 11 of the Alaska Constitution?

The issue could not have been more plainly stated. The fundamental fairness argument was later specifically discussed at pps. 10-11 of the Petition:

> The defendant is not suggesting that the State be required to provide counsel to a motorist in custody under all circumstances; or that the defendant has a right to counsel's presence at all times during the investigatory stage of a prosecution; or even that the State is required to advise a defendant of a right to counsel during sobriety testing. Rather, he is merely positing that if a motorist already has his own counsel and indicates to the officer his desire to communicate with him, the police officer should not prevent him from doing so. As this court in [sic] others

> courts have recognized, there is a "vast difference between a flat refusal to afford access to counsel after it is requested and a failure to advise or warn a defendant of his rights." [cit.om.]
>
> A number of cases from other jurisdictions have recognized that once a motorist requests an opportunity to confer with counsel prior to sobriety testing, he must be given an opportunity to do so. These courts have used either a traditional Sixth Amendment/ Right to Counsel analysis or a Fourteenth Amendment/Due Process Rationale. [cit.om.]
>
> Mr. Copelin urges this court to follow these cases and hold that once a motorist in custody has requested an opportunity to contact his attorney, all sobriety testing should cease for a limited period of time to provide him a reasonable opportunity to telephone his attorney. If no contact can be made within that reasonable time, the motorist will have to make the decision whether to perform this testing on his own. [emphasis in original.]

The cases cited by Mr. Copelin in his Petition as supporting his "fundamental fairness" argument all rely at least in part on the federal

constitution: Hall v. Secretary of State, 231 N.W.2d 396 at 398-400 (Mich. App. 1975); Scarborough v. State, 261 So.2d 475 at 479-480 (Miss. 1972); City of Tacoma v. Heater, 409 P.2d 867 at 869-870 (Wa. 1966); Heles v. State of South Dakota, 530 F.Supp. 646 at 652 (D.S.D. 1982), vac. as moot, 682 F.2d 201; State v. Hill, 178 S.E.2d 462 at 465 (N.C. 1971); State v. Welch, 376 A.2d 351 at 354 (Vt. 1977); and Prideaux v. State, 247 N.W.2d 385 at 387-391 (Minn. 1976) (dicta).

Mr. Copelin did not limit his argument to state statutory and constitutional arguments, as represented by the State in its RESPONSE.

C. The Court of Appeals Decided the Federal Question Raised.

The State correctly points out that the Alaska Court of Appeals did not consider in detail Mr. Copelin's federal constitutional claims. (See Copelin v.

State, 676 P.2d 608, 609 (Alaska App. 1984).) Nevertheless, the court unquestionably decided the federal issues raised. The last paragraph of the court's opinion states:

> Copelin nevertheless argues that he had a constitutional right to contact counsel before being required to perform field sobriety tests. He relies upon Walker v. State, 652 P.2d 88 (Alaska 1982) and Blue v. State, 558 P.2d 636 (Alaska 1977). In Svedlund v. Anchorage, 671 P.2d 378, 382 (Alaska App. 1983), we rejected a similar argument and held that any right to contact counsel prior to taking field sobriety tests or submitting to a breathalyzer examination was a creature of statute and not the state or federal constitutions. In Svedlund, we concluded that Blue, and by implication, Walker were distinguishable. Id. We adhere to that decision. [Id.; emphasis added.]

The State emphasizes that the Court referred to two cases relied upon by Mr. Copelin, Walker v. State, supra, and Blue v. State, supra, which construe Alaska's constitutional guarantee to counsel. In

referring to those cases, however, the court certainly did not imply that Mr. Copelin had relied upon only Walker and Blue. In fact, as has been pointed out above, other cases, including many based upon the Fourteenth Amendment, were specifically relied upon by Mr. Copelin.

The defendant has consistently and repeatedly raised his Fourteenth Amendment/Fundamental Fairness argument before the Alaska courts. The State has no basis for suggesting otherwise.

II. MR. COPELIN'S REQUEST TO TELEPHONE COUNSEL WAS DENIED BY THE TROOPER.

The State takes issue with the defendant's assertion that the arresting trooper "denied" Mr. Copelin's request to telephone his lawyer. (State's Response at 23-25.) The State apparently does not dispute the findings of fact made by the trial court on the trooper's actions; it takes issue only with the conclusion that

the defendant has drawn from those findings.

The case was submitted to the Alaska Court of Appeals essentially on a stipulated statement of facts. (In its brief filed with the Court of Appeals, the State accepted the Statement of Facts contained in the defendant's brief. See Appendix B.)

The "Statement of Facts" portion of the defendant's brief pertaining to the confrontation between Mr. Copelin and Trooper Hall reads as follows:

> On the evening of September 16, 1979, the defendant was stopped on Tudor Road in Anchorage by Trooper Jeffrey Hall on suspicion of operating a motor vehicle while under the influence of intoxicating liquor. After making a preliminary determination that the defendant was intoxicated, Trooper Hall requested the defendant to perform various standard field sobriety tests at the scene. The defendant indicated to the trooper that he wished to telephone his attorney before agreeing to perform any sobriety tests.

> The defendant's requests were ignored by the trooper and he was again instructed to complete the tests. According to Trooper Hall, the defendant then performed all of the required tests, but did so poorly. (The defendant denied that he took the tests after making his request for counsel.) [Record cit.om.; emphasis added.]

The State apparently does not dispute that Mr. Copelin's request to contact his attorney went unheeded by the arresting officer. Instead, the State argues that a police officer does not "deny" a motorist's request for counsel if he simply ignores it. The State's argument suggests that a "denial" can take place only where the police officer somehow verbalizes it. Presumably, if the officer stands mute in the face of a request for counsel (as did Trooper Hall), no "denial" has taken place.

The State's argument cannot be taken seriously. Its adoption would encourage police officers to refuse to respond to

requests for counsel, in order to later claim (as does the State here) that no "denial" of the request took place. Surely, important constitutional rights cannot be so easily circumvented. The defendant was unable to locate any reported decision where a party took this remarkable position.

Resolution of Mr. Copelin's petition should not turn upon a question of semantics. It is undisputed that Mr. Copelin specifically asked the trooper for permission to call his lawyer and the request went ignored. The distinction between "denying" a request and "ignoring" a request largely escapes the defendant.

III. THE QUESTION PRESENTED IS NOT ONE OF FIRST IMPRESSION.

The State claims that Mr. Copelin's petition has raised a question of first impression. That is not true. The question of when, and under what

circumstances, a motorist in custody is entitled to telephone his lawyer has been the subject of literally dozens of cases. Many of these decisions have been collected in several recent A.L.R. Annotations: Annot., Denial of Accused's Request for Initial Contact With Attorney--Drunk Driving Cases, 18 A.L.R.4th 705 (1982); Annot., Denial of Accused's Request for Initial Contact With Attorney--Cases Involving Offenses Other than Drunk Driving, 18 A.L.R.4th 743 (1982); and Annot., Denial of, Or Interference With, Accused's Right to Have Attorney Initially Contact Accused, 18 A.L.R.4th 669 (1982).

As explained supra at pp. 9-10, many of these cases have interpreted the Fourteenth and Sixth Amendments of the U.S. Constitution and have not relied solely upon state statutory or constitutional law.

The State makes much of the fact that Mr. Copelin asked to call his lawyer before he was formally arrested. According to the State, this fact somehow makes this case special. The defendant fails to appreciate the importance of the distinction between "custody" and "arrest" for determining a due process right to counsel. (Cf. Blue v. State, 558 P.2d 636, 642, n.9. (Alaska 1977).)

An analogy can be drawn to the Miranda warning requirement which is triggered, not when a suspect is formally arrested, but when he has been "taken into custody or otherwise deprived of his freedom by the authorities in any significant way." Miranda v. Arizona, 384 U.S. 436, 478 (1966).

Mr. Copelin either had the right to telephone his lawyer or he did not. He urges the court not to resolve the issue on the basis of a distinction between

"custody" and "arrest" which is largely one of form over substance.

Conclusion

This case presents an excellent opportunity for the court to determine when, and under what circumstances, a police officer may ignore a motorist's request to call his lawyer. Because of the large number of drunk driving arrests which occur each year in this country, the question has arisen dozens of times in the state courts with varying results. Mr. Copelin urges the court to accept review of this case and hold that an arresting officer may not ignore with impunity the request of a motorist in custody to call his lawyer.

For all of these reasons, Mr. Copelin respectfully requests that his Petition for Writ of Certiorari be granted.

DATED this ____ day of October, 1984, at Anchorage, Alaska.

BIRCH, HORTON, BITTNER,
PESTINGER and ANDERSON
Attorneys for Petitioner

BY:_____
Daniel Westerburg

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

CHARLES G. COPELIN, Appellant, vs. STATE OF ALASKA, Appellee.	)	[October 5, 1983 Court Date Stamp]

Case No. A-35

MOTION TO TAKE JUDICIAL NOTICE OF PRIOR BRIEFS

COMES NOW the Appellant, CHARLES G. COPELIN, by and through his attorneys, Birch, Horton, Bittner, Pestinger and Anderson, and hereby moves this court for an ORDER judicially noticing the following briefs filed by the parties in Copelin v. State, 635 P.2d 492 (Alaska App. 1981) (file no. 5453):

1. Brief of Appellant, Charles G. Copelin, filed November 10, 1980.

2. Brief of Appellee, filed January 30, 1981.

3. Reply Brief of Appellant, Charles G. Copelin, filed March 10, 1981.

This motion is based upon the accompanying MEMORANDUM IN SUPPORT.

DATED this _____ [sic] day of October, 1983, at Anchorage, Alaska.

BIRCH, HORTON, BITTNER,
PESTINGER and ANDERSON
Attorneys for Appellant

BY: /s/ Daniel Westerburg
Daniel Westerburg

[Certificate of Service]

O R D E R

IT IS SO ORDERED. [October 20, 1983 Court Entry Stamp]

DATED: October 20, 1983

/s/ Carol L. Vance
Carol L. Vance
Deputy Clerk

APPENDIX B

IN THE COURT OF APPEALS FOR THE
STATE OF ALASKA

CHARLES G. COPELIN,	)
	)
Appellant,	)
	)
vs.	)
	)
STATE OF ALASKA,	)
	)
Appellee.	)
	)

Case No. A-35

[Excerpt From Appellee's
October 1983 Brief at p. 4]

STATEMENT OF THE CASE

The state accepts appellant's statement of the case.